of the social and economic development of the country. In reading the opinion one can not but be impressed by the court's extended treatment of the economic and sociological aspects of the situation before it. There is no doubt but that this decision will have a very great influence upon the final determination of the question. G. E. K.

LIABILITY OF A HOST FOR NEGLIGENCE CAUSING INJURY TO A GUEST RIDING IN HIS AUTOMOBILE.—A recent decision of the Kentucky Court of Appeals presents a very interesting discussion of this novel and important question. The plaintiff was riding as a guest in the defendant's machine in the city of Louisville when it collided with a pile of brick stacked in the street. She was thrown to the floor of the back seat and severely injured. She brought suit against the defendant for her damages and recovered a verdict of seventeen hundred and thirty-two dollars. The lower court instructed, in substance, that it was defendant's duty to use ordinary care not to injure the plaintiff, and that if he failed, he was liable in damages for the injury resulting to plaintiff from his negligence. On appeal, the judgment of the lower court was affirmed on the ground that it was appellant's duty to appellee to use ordinary care not to increase the danger of her riding with him, or to create any new danger, and that appellant violated this duty by fast and reckless driving, thereby creating a new danger. *Beard* v. *Klusmeier,* (Ky. 1914) 164 S. W. 319.

The appellant contended that the appellee stood in the position of a licensee upon the land of another, and that the only duty owing to a mere licensee is the exercise of slight care, and that there is, consequently, no liability to a licensee except for gross negligence. This was the theory of the defendant, and was supported by the evidence of himself and his three companions. But to avoid a reversal on the ground that the lower court failed to instruct on the defendant's theory, the Court of Appeals, though styling the plaintiff an invited guest, so frames its decision as to make the rule of law laid down therein applicable to plaintiff though she were a mere licensee. The controlling question then, is what degree of care was owing by the appellant to the appellee under the circumstances.

It is said in SHEARMAN & REDFIELD, NEGLIGENCE, (Fifth Ed. Sec. 706), "The host should always be held responsible to the guest for gross negligence." In COOLEY, TORTS, (Students Ed. p. 731) it is said, "And the general rule supported by the authorities is that the owner or occupant of premises owes no duty to licensees and tresspassers, further than to refrain from wilful acts of injury."

The court in its opinion states that the rule of these authorities has been frequently applied in cases between host and guest in the use of the host's vehicle, but that the authorities are not entirely satisfactory or uniform. It then proceeds to an analysis of two cases as authoritative on the proposition of law laid down by it. The first is the case of *Mayberry* v. *Sivey,* 18 Kans. 291, where the plaintiff was riding with defendant in the latter's buggy and injured through his negligence. The court in holding

defendant liable said, "The law requires from all persons, including those who render gratuitous services, reasonable care for the safety of life and person." The second case is that of *Patnode* v. *Foot,* 153 App. Div. 494, 138 N. Y. Sup. 221, in which defendant was held liable on the authority of the case of *Pigeon* v. *Lane,* 80 Conn. 237, in which the plaintiff, riding on invitation, was declared to be a licensee, and in such case it was said, "The defendants could only be held for their active negligence in causing the injury * * * by which the danger of riding upon the conveyance was increased or a new danger created, while plaintiff was riding under such license." No statement in the case warrants the rule stated by the New York case to be announced therein and adopted by the Kentucky court in the instant case to the effect that the licensor is bound to use ordinary care to avoid increasing the danger to the licensee or creating a new one. The word used is that the defendant was to be liable for "active" negligence by which the danger of riding upon the conveyance was increased, or a new danger created.

Active as distinquished from passive, negligence, means an affirmative act, an act of commission in contradistinction to an act of omission. *Felton* v. *Aubrey,* 20 C. C. A. 436, 74 Fed. 350. This distinction is recognized in many cases where the duty of the licensor to the licensee was involved, and the rule announced is that the licensor owes no duty of active vigilance to prevent injury to the licensee, but only to refrain from intentionally or wantonly injuring him. *Nicholson* v. *Erie R. Co.,* 41 N. Y. 525; *Southcote* v. *Stanley* 1 Hurlst. & N. 246; *Benson* v. *Baltimore Tr. Co.,* 77 Md. 535, 20 L. R. A. 714; *Cole* v. *Vilcutt & Sons Co.,* 214 Mass. 454.

The rule has been announced by the Kentucky court in the case of *Indian Refining Co.* v. *Mobley,* 121 S. W. 657, 24 L. R. A. (N. S.) 497, where plaintiff, while a licensee upon defendant's premises, was injured by the explosion of a steam pipe caused by defendant's negligence. In the opinion denying a right of recovery, it is said, "The generally recognized and established rule is that liability attaches only where some duty is owed, and that a licensee, in entering upon the premises of another, does so at his peril, the owner of the premises being liable only for injuries resulting from wilful acts." And the court quotes with approval the paragraph in COOLEY, TORTS, cited above. It will be seen then that this court recognizes the established doctrine that the licensor's duty to the licensee is to refrain from wilfully or intentionally injuring him. But that this is far different from imposing upon him the duty to use ordinary care not to increase the danger to the licensee or to creat a new one is obvious. The difference between these two degrees of duty is clearly stated in a recent case in Massachusetts, *O'Brien* v. *Union Freight Co.,* 209 Mass. 449, 36 L. R. A. N. S. 492, where, in the course of the opinion denying a right of recovery to the licensee, Justice HAMMOND says, "But it is urged by the plaintiff that this principle is applicable only where the negligence is passive, and that where the danger is caused by an active act which is negligent the owner is answerable, or in other words that the owner or occupier owes to the licensee the duty to refrain from injuring him by an actively negligent act. If the term "act-

ively negligent act" means such an act as may be regarded as wantonly, recklessly, or intentionally injurious to the licensee, the proposition is true; but if it means such as is short of that and arises simply from the failure to exercise ordinary care, then the proposition is not in accordance with the law of this state, so far at least as respects acts done in the transaction of lawful business upon the premises."

This extract shows the almost uniform interpretation of the words "active negligence" for which a licensor is held liable, as evidenced by the current of decisions including those of the Kentucky court. It shows further the vice of the decision in the instant case, in construing the proposition laid down in the Connecticut case of *Pigeon* v. *Lane,* supra, that the licensor was to be liable for "active negligence increasing the danger to the plaintiff or creating a new one" to mean ordinary negligence attended with the same results; for the ordinary negligence that increases the danger or creates a new one, may be the result of acts of omission as well as commission. But the settled rule is that the licensor is not liable for the former class of acts causing injury, nor for the latter unless they amount to what is legally termed gross negligence.

It will thus be seen that the rule arrived at in the instant case is the result of a misconstruction of the term "active negligence," and the enlargment of the duty of the licensor, announced in the *Indian Refining Co.* v. *Mobley* case, supra, from the obligation to refrain from wilfully and intentionally injuring the licensee by affirmative acts to that of using ordinary care not to increase the danger to him or to create a new one.

This explanation is sustained by the case of *Forbrick* v. *Gen. Elec. Co.,* 45 Misc. 452, 92 N. Y. Sup. 36, where the court said, in setting aside a verdict for the plaintiff, a licensee. "In *Walch* v. *Fitchberg R. Co.,* 145 N. Y. 301, 27 L. R. A. 724, Justice PECKHAM said in a similar case in one part of his opinion that the defendant owed the plaintiff a duty to abstain from injuring either intentionally or by failing to exercise reasonable care. If the latter were so, then the rule of negligence in respect to a license would be the very same as in the case of one to whom the full measure of care is concededly due. There would be no distinction in a licensee's case."

These authorities then are directly in support of the appellant's contention that the only duty owing by the licensor to the licensee is that of slight care, and consequently, that the licensor is liable only for gross negligence. They state further the true meaning of the term active negligence and deny the meaning given to the term by the decision of the instant case imposing upon a licensor the duty of using ordinary care not to increase the danger to the licensee or to create a new one.

Logically then, the defendant's proof tending to show the plaintiff to be only a licensee, he was entitled to an instruction on his theory of the case limiting his liability, in case the jury found his contention to be true, to liability only if his neglgence amounted to what is understood in the law as gross negligence.

J. S. K.